No. 2595.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARCHIE A. CLONINGER,

Plaintiff in Error,

vs.

A. H. FINLAISON,

Defendant in Error.

Writ of Error to the District Court of the Territory of Alaska, Third Division.

HON. FRED M. BROWN, *Judge.*

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

Service has not yet been made of the brief for plaintiff in error. Counsel for the defendant in error therefore reserve the right to file a supplemental brief later, but deem it necessary to submit this argument at this time.

STATEMENT OF FACTS.

The court records show that the White River Recording District was created by order entered

May 13th, 1913, and H. E. Morgan appointed Recorder. The plaintiff Cloninger was at Chitina, Alaska, in the following July when that little town was filled with excitement over the Shushana strike. Stories were current that claims were being staked in the Shushana by powers of attorney, and it was known that such powers of attorney were not of record in the district because the Recorder had not yet arrived there. Cloninger was not a miner, and had never even been in a mining camp. Indeed, he had been in Alaska but eight months at the time. However, he and his partner Maddox were grub-staked and outfitted, and they left for the Shushana, arriving there July 30th. They went there hoping to find some good claims covered by invalid locations attempted through unrecorded powers of attorney. The testimony of Cloninger recites these facts. (Record, pp. 20-26.) That testimony and his cross-examination (Record, pp. 28-36) shows that Cloninger was not prospecting but hunting for claims located by power of attorney. Arriving on July 30th they were on the ground in controversy on the morning of August 1st, and saw the defendant's notice of location and stakes. They observed that the claim was located by power of attorney. That was just what they were looking

for, so they went to the recording office and their examination resulted in their return to the ground on the next day, when plaintiff made his attempted location (Record, pp. 23-24). Later he recorded his alleged notice of location, in evidence as plaintiff's Exhibit B (Record, pp. 45-46). The only discovery alleged by the plaintiff is stated in his own testimony (Record, p. 23).

> "Q. What did you do that day on the ground, anything? The first day of August?
>
> A. Why, I panned a little along the creek there.
>
> Q. Did you find anything as the result of your panning?
>
> A. Yes, I found some colors, just very light colors.
>
> Q. Did you pan more than one pan?
>
> A. Yes, I panned several pans.
>
> Q. What did you find, each time about the same?
>
> A. About the same; once or twice I was skunked."

That is the only testimony in the record concerning any discovery made by the plaintiff in error. He then brought this action in ejectment against the defendant for possession of the ground. The trial resulted in a judgment of non-suit (Record, pp. 40-44).

THE JUDGMENT FOR NON-SUIT SHOULD BE SUSTAINED.

And for several reasons. We shall urge especially, (1) that there was no discovery, and (2) that the recorded notice of location is not a sufficient compliance with the laws of Alaska in force at the time.

ARGUMENT AS TO DISCOVERY.

We have copied the only evidence in the record as to any discovery claimed by the plaintiff in error. He says that he "found some colors, just very light colors." He "panned several pans" and found each time "about the same; once or twice I was skunked."

There is no testimony to the effect that the indications of placer gold were such as would justify a prudent man in spending any time or money in development. Indeed, he does not even testify that he found gold, just "colors," whatever that may mean, and he qualified that by adding "just very light colors." We presume he found the same in the creek, as he says he "panned a little along the creek there," but he does not say whether he reached bed-rock, or saw any bed-rock, or whether he obtained the colors in the gravel or in the muck or tundra. He says nothing about mineral

indications in the vicinity. There is no testimony that any mining had been done anywhere along that creek or indeed anywhere in the vicinity. The entire testimony is summed up in the statement that he joined in the rush to the Shushana and found "just very light colors" on a creek about five miles from Little Eldorado where James was sluicing (Record, p. 29). Yes, the testimony also shows that the plaintiff and his partner "jumped" two or three other claims already located by power of attorney (Record, pp. 33-34), and particularly that the plaintiff made the location of the ground in controversy, assuming the defendant's prior location of the same to be invalid because his power of attorney was not recorded prior to the staking of the ground (Record, p. 31).

There is absolutely no testimony to show that plaintiff in error discovered anything which would justify a prudent man in spending time and money in its development. True, he saw the notice and stakes of the defendant in error, and knew that the ground was already located for placer, but the mere fact that this is a contest between mineral claimants does not relieve plaintiff of the necessity of proving a discovery. We quote from Justice

Brewer *in re Chrisman vs. Miller,* 197 U. S. 313, 49 L. Ed. 770, 25 Sup. Ct. Rep. at 471:

> "It is true that, when the controversy is between two mineral claimants, the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact, either that there is a vein or lode carrying the precious metal, or, if it be claimed as placer ground, that it is valuable for such mining."

In that case the U. S. Supreme Court affirmed the Supreme Court of California in holding that seepages of oil and other indications of petroleum did not constitute a sufficient discovery of mineral to support the location.

In *Charlton vs. Kelly,* 156 Fed. 433, at 436, Judge Gilbert states that

> "there must have been such a discovery of gold as to give reasonable evidence that the

> ground is valuable for placer mining, taking into consideration its character, location and surroundings."

And continuing, this court refers to *Chrisman vs. Miller, supra,* wherein Justice Brewer quoted with approval the language of Justice Field in an opinion *in re Iron Silver Mining Co. vs. M. & S. G. & S. Mining Co.,* 143 U. S. 394, 36, L. D. 201, 12 Sup. Ct. Rep. 543.

This court also, in the Alaska case of *Lange vs. Robinson,* 148 Fed. 799, considered and discussed the subject exhaustively. It is true that the judgment of non-suit in that case was reversed, and the case remanded for a new trial, although the only testimony as to an actual discovery of gold in the ground was that the locator "found in the several washings from two to six fine colors of gold." Even that was much more than the plaintiff Cloninger found. Indeed, he does not even claim to have found gold at all, but *in re Lange vs. Robinson,* this court says at page 804:

> "There was an actual discovery of gold upon each of the claims located. They are situated near other lands presenting the same surface indications, which at the date of the location of these claims were known to be valuable for the placer gold which they con-

> tained; and these facts, according to the uncontradicted testimony of the plaintiff and that of the witness Field, above quoted, were sufficient to justify the expenditure of money for the purpose of their exploration, with the reasonable expectation that, when developed, they would be found valuable as placer mining claims. This was in our opinion all that was necessary."

In this case no actual discovery is shown, unless the "colors" found by Cloninger are to be treated as an actual discovery of gold. None of the other surrounding conditions recited in the Lange opinion are shown by the testimony in this case.

What constitutes a sufficient placer discovery has been so many times and so ably argued and fully considered by this court that we will not burden this brief with a further citation of authorities. We submit that the numerous decisions of this court in Alaska cases abundantly support the contention of the defendant in error that in this case the testimony does not show a sufficient discovery.

ARGUMENT AS TO THE RECORDED NOTICE OF LOCATION.

The law of Alaska relating to mining locations in force on the date of Cloninger's alleged location is contained in the act of the Legislature of Alaska

approved April 30th, 1913. For the convenience of the court we copy Sections 13-18 incl. of that act from the Session Laws of 1913, pp. 289-291:

> "Sec. 13. Any person who discovers upon the public domain of the United States, within the Territory of Alaska, a placer deposit of gold, or other deposit of mineral having a commercial value, which is subject to entry and patent under the mining law of the United States, may, if qualified by the laws of the United States, locate a mining claim upon such deposit in the following manner:
>
> Sec. 14. He must at the time of discovery post conspicuously at the point of discovery, a notice of location thereof, containing (a) the name or number of the claim; (b) the name of the locator or locators; (c) the date of discovery and posting of notice as in this section provided for; (d) the number of feet in length and width claimed; the notice herein described shall be known as the location notice.
>
> Sec. 15. At the time of posting the notice of location, he shall distinctly mark the location on the ground so that its boundaries can be readily traced, by placing at each corner or angle thereof substantial stakes or posts not less than three feet high above the ground and three inches in diameter and hewed on the side or sides facing the claim, or by placing at each corner or angle thereof mounds of earth or rock not less than three feet high. Whatever monument is used it must be marked with

the name or number of the claim and the designation of the corner by number, and the monument nearest the discovery shall be the initial post, stake, or monument and shall be post, stake or monument number one; and further the corners shall be numbered in regular rotation. If the claim is located on ground that is covered wholly or in part with brush or trees, such brush shall be cut and trees be marked or blazed along the lines of such claim to indicate the location of such lines. If located in an open country the boundary lines shall be marked by placing line stakes or line monuments so as to readily lead from corner to corner of such claim.

Sec. 16. Within ninety days from the date of discovery, and prior to the filing of the certificate of location as provided in the following section, the locator or locators shall perform labor upon such claim in developing the same to an amount which shall be equivalent in the aggregate to one hundred dollars' worth of such work for each twenty acres or fractional part thereof contained in such claim, and such work shall be known and shall constitute "location work."

Sec. 16½. Nothing in this act shall be held to apply to lands located under the laws of the United States as placer claims for the purpose of the development of petroleum and natural gas and other natural oil products.

Sec. 17. Within ninety days after the discovery the locator shall record with the re-

corder of the precinct wherein such claim is situate, a certificate of location. Such certificate shall contain:

(a) The name or number of the claim;

(b) The name of the locator or locators;

(c) The date of discovery and posting of the location notice;

(d) Number of feet in length and width claimed.

Such certificate shall also set forth a description of the location of such claim with reference to some natural object, permanent monument or well known mining claim; a description of the boundaries, corner monuments and markings thereon, and a description of the location work and the place where the same has been performed. Such certificate of location shall not be accepted for record by the precinct recorder unless the same be verified, before the recorder of the precinct or some officer authorized to administer oaths, by the locator, or one of the locators, if there be more than one, or by the authorized agent, having personal knowledge of the facts required to be stated therein. For such verification and the execution of the certificate thereof the precinct recorder or other officer taking and executing the same shall charge a fee of not more than fifty cents. A certificate of location so verified, or a certified copy thereof, shall be *prima facie* evidence of all the facts properly recited therein.

Sec. 18. If the discoverer of any placer deposit fail to comply with any of the provisions

of Sections 14, 15, 16 and 17, within the time therefor specified, all right to appropriate any portion of the public domain, acquired by him by reason of his discovery, shall cease, and any placer mining claim attempted to be located in violation of Sections 12¼, 12½ and 12¾, or any of them, shall be null and void, and the area thereof may be located by any qualified locator as if no such previous attempt had ever been made."

The only compliance with that law, as to record of notice of location and proofs of labor, is shown in the documents in evidence as Plaintiff's Exhibit B (Record, pp. 45-46). The two documents were separately recorded, but on the same date, in the following language:

"NOTICE OF PLACER LOCATION.

Notice is hereby given that the undersigned, a citizen of the United States, has on this 2nd day of August, 1913, discovered at the place where this notice is posted a valuable placer deposit bearing gold, and I do hereby locate and claim the same as No. 1 Bear Creek placer mining claim. This claim is situated in the White River Mining District, Territory of Alaska.

The point of discovery whereon this notice is posted is situated close to initial post or monument. Bear Creek is tributary to Big Eldorado, and from thence the boundaries of

said claim are marked as follows:

(Initial Post.)

I claim 1,320 ft. up stream from this post and 330 ft. each side of this post (20 acres). The boundary of this claim is marked by 4 corner posts and 2 center posts. The 4 corner posts are willow posts and centers are rock monuments.

Notice dated and posted on the date aforesaid.

ARCHIE A. CLONINGER,
Locator and Claimant.

Filed by A. Cloninger at 11 a. m., Aug. 16, 1913.

H. E. MORGAN, Recorder.

By M. R. HEALY, Deputy. $2.00.

PROOF OF LABOR.

White River Recording Office.

August 16, 1913.

I, the undersigned, hereby certify that I have done more than One Hundred Dollars' worth of labor and improvements on the No. 1 Bear Creek Placer Claim, which consists of Open Cut 4½′ by 3′ by 40 feet, and was done in ten eight-hour days.

ARCHIE A. CLONINGER.

Subscribed and sworn to before me this 16th days of August, 1913.

HORATIO E. MORGAN,
Notary Public.

> Filed for record by A. Cloninger at 11 a. m., Aug. 16, 1913. H. E. Morgan, Recorder. By M. R. Healy, Deputy. Seal, $3.00."

We submit that the trial court was compelled to hold that these documents are in no sense a compliance with the laws of Alaska. Indeed, they are not even a compliance with the Federal Statute, for while record is not required by the Federal Law, Section 2324 U. S. Rev. Stats. provides that

> "All records of mining claims hereafter made shall contain * * * such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

This notice is in no sense a compliance with that requirement, and certainly it is not a compliance with the Alaska law. The only reference to a natural object or permanent monument is that the claim may be construed from its name to be situated on Bear Creek, though even that much appears but inferentially. There is absolutely nothing to show on which part of Bear Creek the claim is situated. The creek may be several miles long and the claim located anywhere upon its length. There is not even a reference to any other mining claim. The "description of the boundaries, corner monuments and markings thereon" amounts to

nothing further than that the claim is "1,320 ft. up stream from this post and 330 ft. each side of this post." The only description of the markings is that "the 4 corner posts are willow posts, and the centers are rock monuments." Note the Alaska law in Section 15 specifically fixes the size and dimensions of the stakes or monuments, and requires that

> "Whatever monument is used, it must be marked with the name or number of the claim and the designation of the corner by number, and the monument nearest the discovery shall be the initial post, stake or monument, and shall be post, stake or monument No. 1; and further the corners shall be numbered in regular rotation."

The recorded notice is lacking in this respect, and although of paramount importance it is also lacking the verification required by law. The proofs of labor were recorded as a separate document, and are verified, but such proofs of labor, or "location work," lacks a description of "the place where the same has been performed," as required by Section 17.

Now we must assume that the Legislature of Alaska meant something when it enacted the law of 1913. It was profiting by the experience of other

mining states, and the law is substantially the same as that in force in the State of Montana for many years. Such laws, in Montana and other mining states, have been repeatedly upheld by the state and federal courts, and even by the Supreme Court of the United States in the case of *Butte City Water Co. vs. Baker,* 196 U. S. 119, 49 L. Ed. 409, 25 Sup. Ct. Rep. 213, from which we quote:

> "The Montana statute (Montana Codes Annotated, Sec. 3612), among other supplementary regulations, provided that the declaratory statement filed in the office of the clerk of the county in which the lode or claim is situated must contain "the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims,' and 'the location and description of each corner, with the markings thereon.' A failure to comply with these regulations was the ground upon which the Supreme Court of Montana held the location invalid. It is contended that these provisions are too stringent, and conflict with the liberal purpose manifested by Congress in its legislation respecting mining claims. We do not think that they are open to this objection. They certainly do not conflict with the letter of any Congressional statute; on the contrary are rather suggested by Section 2324. It may well be that the State Legislature, in its desire to guard against false testimony in respect to a location, deemed it important that full

particulars in respect to the discovery shaft and the corner posts should be, at the very beginning, placed of record. Even if there were no danger of false testimony, it was not unreasonable to guard against the resurrection of incomplete locations when, by subsequent explorations, mining claims of great value have been uncovered.

We see no error in the rulings of the Supreme Court of Montana, and its judgment is affirmed."

The U. S. Supreme Court in that case affirmed the decision of the Supreme Court of Montana in the same case, while the Montana court based its decision on the authority of *Purdum vs. Laddin,* 23 Mont. 387, 59 Pac. 154, from which we quote:

"In granting a new trial, the District Court did not err. Section 3612 of the Political Code provides that within 90 days from the date of posting upon the claim the location notice required by Section 3611, there must be filed with the county clerk a declaratory statement, which must contain, among other things: '7. The location and description of each corner, with the markings thereon.' The statute is mandatory, and substantial compliance with its provisions is necessary to perfect a valid location."

We also deem it worth while to quote the following from the opinion of Judge DeWitt *in re*

McCowan vs. McLay, 16 Mont. 234, 40 Pac. 603:

> "The declaratory statement on oath must be of the discovery or location, and not simply of the description of the claim. This language seems to be clear, and the intent seems to be plain. A few lines further in the statute it is also provided that the declaratory statement shall also describe such claim in the manner provided by the laws of the United States. Therefore it appears that the declaratory statement shall be of the discovery or location, as well as the description of the claim, and it would be unreasonable to hold that a person taking oath that the description of a claim was correct was thereby taking oath that all other matters set up in the notice of location or declaratory statement were also true. It therefore follows that the location notice of Yellow Jacket lode, being verified as to only one of its items, was not a declaratory statement on oath of the discovery or location of a claim. It is observed that the affidavit further states that the locators have fully complied with the requirements of law and local customs. This, however, is simply a conclusion of law, stated by the locators, and not a verification of any fact. *Anthony v. Jillson*, 83 Cal. 296, 23 Pac. 419. We must therefore conclude that plaintiff's location notice was fatally defective."

The Montana statute has been upheld as mandatory and the requirements absolute. Later cases to that effect are *Hickey vs. Anaconda C. M. Co.,*

33 Mont. 46, 81 Pac. 806, cited with approval in *Washoe Copper Co. vs. Junila,* 43 Mont. 178, 115 Pac. 918.

This is true of similar requirements in other states, all of which have been upheld as mandatory. We quote the following from *Van Buren vs. McKinley,* 8 Idaho 93, 66 Pac. 937:

> "It is contended by counsel for appellant that an affidavit is not necessary to make a valid location; that the law requiring it imposes a condition precedent upon citizens about to locate mining ground not contemplated by the laws of the United States, and in conflict with them, and therefore the state law imposing such condition is absolutely void. Under the provisions of Section 2322, Rev. St. U. S., state, territory and local regulations are authorized to be imposed as a condition precedent to the possession of mining claims, not in conflict with the laws of the United States. Requiring an affidavit to be attached to the location notice of a mining claim as provided by Section 3104, Rev. St., is not in conflict with the provisions of said Section 2322. It is a reasonable regulation that the Legislature is fully authorized to make. *Dunlap v. Pattison* (Idaho), 42 Pac. 504. The Supreme Court of Montana in several cases have held that the statute requiring an affidavit to a location notice of a mining claim was not in contravention of the federal stat-

utes. *McBurney v. Berry,* 5 Pac. 867; *McCowan v. McLay,* 40 Pac. 602; *Berg v. Koegel,* 40 Pac. 605."

A similar statute was upheld in the State of Washington *in re Knutson vs. Fredlund,* 56 Wash. 634, 106 Pac. 200.

The Alaska law requires several statements which are wholly lacking in the location certificate recorded by the plaintiff in error, notably a description of the claim with reference to some natural object or permanent monument; a description of the boundaries, corner monuments and markings thereon; a description of the place where the location work has been performed, and especially that such recorded notice shall be verified. These requirements in Montana and other states have been uniformly upheld by the courts as mandatory. Surely that must be so in Alaska, especially as Section 18 of the Alaska law specifically provides that if the discoverer fails to comply with any of such provisions "all right to appropriate any portion of the public domain acquired by him by reason of his discovery shall cease."

We respectfully submit that the alleged location of the plaintiff in error was not based upon any sufficient discovery of placer gold, or upon any

discovery whatever; that there is no testimony in the record showing that he posted the notice of location as required by Section 14 of the Alaska mining law, and certainly the recorded notice wholly fails to comply with the mandatory provisions of the Alaska law. The writ of error should be denied and the judgment of non-suit affirmed.

Respectfully submitted,

MAURICE D. LEEHEY,
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Of Counsel.